



Indiana's Public Access Laws

**Indiana State Board of Accounts
City and Town Clerk Treasurers' Conference**

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Indiana Public Access Counselor**

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The Public Access Counselor

Background & History of the PAC:

- The Public Access Counselor provides advice and assistance concerning Indiana's public access laws (the Access to Public Records Act and the Open Door Law) to members of the public and government officials and employees.
- Governor Frank O'Bannon created the office by executive order in 1998 after a statewide collaboration of seven newspapers found great obstacles in obtaining government information in Indiana.
- In 1999, the General Assembly created the office statutorily.



The Public Access Counselor

Some of the powers and duties of the public access counselor:

- Educating public officials and members of the public on the public access laws.
- Responding to informal inquiries concerning the public access laws.
- Issuing formal advisory opinions in response to formal complaints alleging violations of the laws.
 - However, the counselor may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed.



The Public Access Counselor

The PAC Office:

- The counselor is appointed by the Governor for four year terms. The terms expire in non-election years, so the PAC terms typically overlap with different administrations.
- The PAC office employs the counselor, a legal assistant, and legal interns who assist with investigations and research.
- The PAC office also maintains a website, available at <http://www.in.gov/pac>, where you can find the *Handbook on Indiana's Public Access Laws*, prior opinions and answers to frequently asked questions, among other resources.



The Public Access Counselor

2010-2011 Fiscal Year

- Received 1600 inquiries
- 349 Formal Complaints Filed
 - 32 Alleged ODL Violations
 - 317 Alleged APRA Violations
 - 111 Inmate Complaints filed
 - 32 Withdrawn Prior to Opinion Issued
 - 87 Violations Found
 - 7 ODL/80 APRA

Open Door Law

The Open Door Law

- The full text of the Open Door Law (“ODL”) can be found at Ind. Code § 5-14-1.5-1 *et seq.*
- What does the ODL require?
 - “[A]ll meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them.” I.C. § 5-14-1.5-3(a).
 - The ODL also requires 48-hour advanced notice of meetings. I.C. § 5-14-1.5-5.



Open Door Law

Notice Requirements --I.C. § 5-14-1.5-5

- The notice requirements apply to open meetings, reconvened meetings, rescheduled meetings, and executive sessions
- Must post notice of date, time and location of meeting 48 hours in advance of meeting
 - The 48 hours does **not** include Saturdays, Sundays, or legal holidays
 - If you are a state agency, must be provide electronic access to notice through the "computer gateway"



Open Door Law

Posting or Delivery of Notice

- Notice must be posted at agency's principal office or at meeting place
- The agency must also deliver notice to all news media that deliver by January 1 an annual written request for such notices.
- Possible legislative amendment.



Open Door Law

Notice of Public Meeting:
Xavier Town Council
Wednesday, November 16, 2011
5:30 p.m.
City Hall, Room 104

123 Main Street, Xavier, Indiana



Open Door Law

Notice of Public Meeting:

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Open Door Law

Executive Sessions

- I.C. § 5-14-1.5-6.1
- A meeting from which the public is excluded, except for persons necessary to carry out business
- Memoranda statement
- The governing body may not take final action (i.e., vote) in an executive session but may make decisions in the executive session. See *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001).



Open Door Law

Reasons for Executive Sessions

- Discussion of strategy with respect to initiation of litigation or litigation that is pending or has been threatened in writing (I.C. § 5-14-1.5-6.1(b)(2)(B))
- To receive information about and interview prospective employees (I.C. § 5-14-1.5-6.1(b)(5))
- To discuss a job performance evaluation (I.C. § 5-14-1.5-6.1(b)(9))



Open Door Law

Notice of Executive Session

Xavier Town Council Executive Session

Wednesday, November 16, 2011

5:00 p.m.

City Hall, Room 104

123 Main Street Xavier, Indiana

The Council will meet to discuss a job performance of
an individual employee as authorized under
I.C. 5-14-1.5-6.1(b)(9)



Open Door Law

Notice of Executive Session

Xavier Town Council Executive Session

Wednesday, November 16, 2011

5:00 p.m.

City Hall, Room 104

123 Main Street Xavier, Indiana

Personnel and Litigation to be discussed



Open Door Law

Notice of Executive Session

Xavier Town Council Executive Session

Wednesday, November 16, 2011

5:00 p.m.

City Hall, Room 104

123 Main Street Xavier, Indiana

The Council will meet pursuant to I.C. 5-14-1.5-
6.1(b)(9)



Open Door Law

Is Electronic Mail a “Meeting”?

- Members of governing bodies must be cautious in use of email when it is used between and among members to conduct official business.
- Indiana courts have not specifically addressed the issue, but previous PACs have opined that email is not a “meeting” under the ODL*
 - Keep in mind the APRA

Open Door Law

○ Memoranda Requirements

- Requirements found under I.C. 5-14-1.5-4(b)
 - Date, time, location of meeting
 - Members recorded as either present or absent
 - General substance of all matters proposed, discussed, or decided
 - A record of all votes taken, by individual members if a roll call is taken
 - Any additional info required under I.C. 5-1.5-2-2.5 (Indiana Bond Bank
- Required to be made available within a reasonable period of time after the meeting.
- “Draft minutes”
- Executive Session Certification Statement



Open Door Law

- No Right of the Public to speak
- No requirement to Deliberate
- No agenda requirement
- Definition of “Meeting”
 - Gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business
 - Official Action = receive information, deliberate, make recommendations, establish policy, make decisions, take final action.



Access to Public Records Act

The Access to Public Records Act ("APRA")

- Purpose: "Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information."



Access to Public Records Act

Public Agency's Responsibilities

- Respond to requests made in person or via telephone within 24 hours of receipt.
- Respond to mailed, faxed, or e-mailed requests within seven days of receipt.
- Respond in writing to written requests for records
 - Best practice for requesters is to submit all requests in writing, and for agencies to respond to all requests in writing.



Access to Public Records Act

- Responding is not necessarily producing the record; the PAC's opinions have consistently been that the records should be produced within a reasonable time
- PACs have considered factors such as
 - the nature of the requests (whether they are broad or narrow)
 - how old the records are
 - whether the records must be reviewed and redacted



Access to Public Records Act

- The burden lies with the public agency to show the time period for producing documents is reasonable.
- TIPS re: voluminous records requests:
 - Communicate frequently.
 - Document communications.
 - Try to negotiate a production deadline from the outset.
 - Release portions of records periodically



Access to Public Records Act

- The APRA does not require an agency to stop doing business to respond to public records requests.
 - Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a).
 - However, section 7 does not operate to otherwise deny a requester's rights under the APRA. I.C. §5-14-3-7(c).

Access to Public Records Act

Denials

- If denying records, agencies should state reason for denial with citation to specific authority, and give name and title or position of person responsible for denial. I.C. § 5-14-3-9.
 - TIP: Citing unspecified “privacy laws” or referring generally to “HIPAA” is not sufficient. (*Formal Opinion 05-FC-104*: agency did not demonstrate that it was a HIPAA-covered entity)

Access to Public Records Act

Exceptions to Disclosure - I.C. § 5-14-3-4.

- Section 4(a) categories are confidential
 - Confidential under federal/state statute
 - Trade secrets
 - Confidential financial information obtained, upon request, from a person.
 - Does not include information filed “pursuant to state statute.”
 - Court records declared confidential under rules adopted by Indiana supreme court (Admin. R. 9)
 - Social security numbers
 - Patient medical records created by a “provider.”



Access to Public Records Act

Section 4(b): Discretionary Exemptions

- Investigatory records of law enforcement
 - No open/closed distinction; applies to records compiled by law enforcement
- Public employees' personnel file information
- Attorney-client privileged communications and attorney-work product
- Records developed or prepared during discussion in an executive session
- Deliberative materials - Record that are intra-agency or interagency advisory or deliberative material, that are expressions of opinion or speculative in nature, communicated for purposes of decision making.



Access to Public Records Act

- If a record contains disclosable and nondisclosable information, the agency shall separate the disclosable material and make it available. I.C. § 5-14-3-6.
- However, if the factual material is “inextricably linked” with the deliberative material, the APRA permits the public agency to withhold the factual material.
- If an agency does not have a record that is responsive to the request, not required to create or produce a record (APRA = Records, not information).

Access to Public Records Act

Electronic Mail

- A public record is any record, including electronic media, that is created received, retained, maintained, or filed by or with a public agency.
- Electronic mail must be available for inspection and copying by the governing body unless an exception to disclosure, based on the content of the email, applies.
- Electronic mail must be maintained in accordance with records retention schedules, pursuant to I.C. 5-15.
 - Most agencies have their own retention schedules.



Access to Public Records Act

What about emails that are not on the public employee's official email account?

- Email messages maintained in a personal email account (e.g. Yahoo! account) are generally not public records subject to disclosure.
- If the personal email is submitted to the agency, it becomes a public record.
 - Example: A council member prints a personal email message from a neighbor and gives it to a city employee for follow-up.

Access to Public Records Act

Copy Fees

- Local agencies may charge only the fee schedule adopted by fiscal body and authorized by I.C. § 5-14-3-8.
- May not exceed the *actual cost* for providing a copy of the public record.
- Actual cost is the cost of the paper and per page cost for use of the equipment.
 - Actual cost cannot include labor or overhead. I.C. § 5-14-3-8(d)(2).
- Can require advanced payment
- APRA's general provisions regarding fees are sometimes superseded by a specific statute allowing higher fee.
 - County recorders – I.C. § 36-2-7-10.
 - County clerks and court records - I.C. § 33-37-5-1.



APRA and ODL

Enforcement Provisions

- A person may file a complaint with the public access counselor alleging a denial of a right under APRA or ODL.
- The PAC sends formal complaint to the agency for response and issues a formal advisory opinion within 30 days.
- Any person may file a lawsuit in superior court to compel the agency to produce a record or declare an action void.

APRA and ODL

Enforcement Provisions, cont.

- If a person prevails in court and has received an advisory opinion from the PAC, the laws provide that the person *shall* be awarded reasonable attorney's fees, court costs, and other reasonable costs of litigation.
- Please remember that all records submitted to the Public Access Counselor's office are public records unless a statutory exemption exists.



APRA and ODL

- Miscellaneous
 - 2012 Legislative Amendments
 - Request Info for PAC Office
 - Handbooks



Office of the Public Access Counselor

- Our contact information
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